

Filed 2/7/19 P. v. Shipley CA2/1
Opinion after vacating opinion filed on 8/31/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LAURA LYNN SHIPLEY,

Defendant and Appellant.

B282524

(Los Angeles County
Super. Ct. No. NA102653)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed and remanded with directions.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Laura Shipley appeals from a judgment of conviction for second degree robbery. She challenges the sufficiency of the evidence, argues that the trial court erred in admitting evidence of prior crimes, and claims the trial court abused its discretion in denying her motion to strike a prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Defendant demonstrates no error under the appropriate standards of review. We affirm the judgment. Upon remand, the trial court shall exercise its newly-obtained discretion to strike or dismiss a prior serious felony conviction for sentencing purposes.

FACTUAL AND PROCEDURAL BACKGROUND

1. Information

In a two-count information filed in March 2016, defendant was charged with attempted second-degree robbery (Pen. Code, §§ 211, 664)¹ and second-degree robbery (§ 211). The information contained allegations of prior convictions for robbery (occurring in 2008), assault with a deadly weapon (occurring in 2008), and two counts of burglary (occurring in 2008 and 2013). It also contained allegations that the prior robbery fell within the definition of a violent felony and that all of the priors fell within the meaning of section 667.5, subdivision (b) in that defendant did not remain free of prison custody and committed a felony offense within a five-year period. After the close of the People's case, the trial court granted defendant's motion to acquit on the attempted

¹ Further undesignated statutory references are to the Penal Code.

second-degree robbery count for insufficient evidence pursuant to section 1118.1.

2. Evidence at trial

The evidence at trial showed defendant entering into a Super Dollar Store and putting merchandise from the store in her purse. The manager, Youn Suk Park, repeatedly told her to return the merchandise and leave the store. She returned some, but not all of the merchandise. After asking her several times to return the remaining merchandise, Park held her purse, which contained the store merchandise, and defendant repeatedly punched Park's face. Defendant told Park that she did not have any additional merchandise in her purse.

Park suffered multiple bruises and scratches. In a 911 tape played for jurors, a store employee described defendant as "so violent." A store video showed that Park repeatedly asked defendant to remove the items from her purse and leave the store.² Officers arrived at the scene and found store merchandise in defendant's purse. Defendant also had cash in her purse.

Testimony from two prior incidents was admitted under Evidence Code section 1101, subdivision (b). The court overruled an objection under Evidence Code section 352.

With respect to the first incident, Yung Ho Lee testified that on December 17, 2012, he worked at Cedar Liquor. Defendant took a beer from the liquor store and tried to exit the store without paying for it. Lee retrieved the beer and told defendant not to return to the store. Five minutes later she

² We have reviewed the video, which confirmed the testimony indicating that defendant became violent when confronted by Park.

returned and tried to “steal again.” Lee took her bag, and defendant hit Lee’s face and overturned a display of items on the store counter. During cross-examination, Lee testified that earlier that day, defendant had purchased beer from the store.

The second incident occurred on July 22, 2008 in the same store. Juventina Gonzales, a store employee, testified that defendant took two bottles of nail polish and put at least one in her purse. Gonzalez initially testified that when she asked defendant for the nail polish, defendant gave one bottle to Gonzales and put the other in her bag. Gonzalez later testified that defendant gave her the first bottle of nail polish and threw the other bottle directly at Gonzalez. When another employee, Areciela Valdevinos, came to assist, defendant punched Valdevinos in the face. As she exited the store, defendant kicked merchandise to displace it from the shelving.

3. Defendant’s defense

Defendant did not testify, and no witness testified for the defense.

During closing argument defense counsel acknowledged that defendant was involved in the prior two incidents. Counsel argued: “Miss Shipley has some anger issues, alcohol issues, and a problem with shoplifting.” Defense counsel did not dispute that the current incident involved a theft.

Counsel argued that defendant did not commit a robbery. Counsel argued: “Now, there’s no doubt that during this whole incident, Miss Shipley threw punches and connected and hit Mr. Park. She did so to try to gain control of her purse and for no other reason.” “The struggle, the force used was not used to permanently deprive Mr. Park of any of his property. The force used wasn’t used to steal anything or take anything or keep

Mr. Park from getting back his property. The force that was used was to keep control of her purse and not let Mr. Park take her purse.” “The evidence shows that the force used was for her to keep her purse and for no other reason.” Defendant’s “actions were to retain the purse. She didn’t have the specific intent to permanently deprive Mr. Park of his property or to take the property. The force wasn’t used for that. The force was used for one purpose, to retain the purse.”

4. Instructions

The jury was instructed that in order to convict defendant of robbery, the People were required to prove: “1. The defendant took property that was not her own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his immediate presence; [¶] 4. The property was taken against that person’s will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 6. When the defendant used force or fear to take the property, she intended to deprive the owner of it permanently.”

With respect to the uncharged offenses, jurors were instructed: “If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] [1] The defendant acted with the intent to deprive the owner of the item taken permanently; [¶] [2] The defendant’s alleged actions were the result of mistake or accident; [¶] [3] The defendant had a plan or scheme to commit the offense alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense. [¶] Do not consider this evidence for any other

purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crimes. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Robbery. The People must still prove that charge beyond a reasonable doubt.”

5. Conviction

The jury found defendant guilty of second degree robbery. Defendant waived her right to a jury trial on the prior conviction allegations. Defendant admitted the alleged priors and admitted that one constituted a strike conviction and two consisted prison priors within the meaning of section 667.5.³

6. Probation report

The probation report indicated that defendant was on postrelease community supervision when she committed the current offense. During her supervision, defendant tested positive twice for methamphetamine and amphetamine. Defendant failed to report to six drug tests.

Defendant’s prior criminal convictions include driving under the influence (1995); battery (1997); driving without a license (1997); battery on a peace officer (1998); hit and run (2000); offer for payment in connection with the adoption of a child (2001); two counts of driving under the influence (2001);

³ Although the People alleged four prior offenses within the meaning of section 667.5, the People ultimately pursued only two of those offenses.

hit and run (2004); driving with a suspended license (2005); disorderly conduct (2012); and burglary (2012).

7. *Romero* motion and sentence

Defendant moved to dismiss her prior strike conviction in the interest of justice. In her motion, she asserted that she suffered a rough childhood. According to defendant, her mother was an alcoholic and verbally abused her. Defendant represented that in 1997, she was in a car accident causing her to suffer traumatic brain injury. According to defendant, she “self-medicate[d]” with alcohol and methamphetamine.” Defendant acknowledged she had been convicted of numerous crimes between 1995 and 2005.

The prosecutor argued that defendant had a lengthy criminal history including violent conduct. The prosecutor further argued that defendant did not fall outside the spirit of the three strikes law.

The trial court considered defendant’s *Romero* motion and rejected it. Noting that this was a sad case, the court concluded that in the interest of justice “not only for the defendant but for society and the victim,” the court should not strike the prior conviction. The court sentenced defendant to prison for an aggregate term of 12 years. This appeal followed.

DISCUSSION

We discuss defendant's arguments seriatim. None has merit.

A. Substantial Evidence Supported Defendant's Conviction

Robbery is defined as “ ‘the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by the means of force or fear.’ ” (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) “To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his presence.” (*Ibid.*) The relevant time period includes both obtaining the object and carrying it away. (*Id.* at p. 256.) “[A] robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away.” (*Ibid.*) Thus, if force is used either to obtain the property or to carry it away, the crime is elevated from theft to robbery. (*Id.* at pp. 258, 261.)

Defendant's challenge to the sufficiency of the evidence of robbery ignores the appropriate standard of review. We review “ ‘the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Maury* (2003) 30 Cal.4th 342, 396.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” ’ the jury's verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th

327, 357.) “Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal.” (*Id.* at p. 358.)

1. Force or fear

Defense counsel argued that defendant used force only to keep control of her purse. The jury’s verdict demonstrates that it rejected this argument, and the jury’s verdict is supported by the following substantial evidence. Park observed defendant place merchandise in her purse. Park repeatedly asked defendant to remove the merchandise from her purse and leave the store. Defendant refused to return all of the merchandise. When Park held the purse containing the remaining merchandise, defendant repeatedly struck him in the face causing bruising and scratching. Park testified that he wanted the merchandise returned; he did not want defendant’s purse. Defendant did not tell him that she wanted to retain control of her purse. She lied and said that she did not steal anything. Based on this evidence, reasonable jurors could have concluded that defendant struck Park to retain and carry out the merchandise she took from the store.

2. Specific intent

On appeal, defendant states that: “It is not at all clear that appellant intended to steal the items from the store that were in her handbag. She may well have intended to take them over to the cashier and pay for them.” Proposing an alternative conclusion on appeal is insufficient to warrant reversal of the judgment. (*People v. Zamudio, supra*, 43 Cal.4th at p. 358.)

When the defendant is charged with a specific intent crime, “ ‘[e]vidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.’ ” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The following evidence strongly supported the jury’s verdict that defendant harbored the requisite specific intent. Defendant placed the items in her purse. When Park told her to remove the items and leave the store, she returned some of the items, supporting the inference that she did not intend to pay for them. Defendant repeatedly struck Park in the face. At no time, did defendant say or otherwise indicate that she intended to pay for the merchandise. There was no evidence that defendant intended to pay for the items she placed in her purse. Evidence of defendant’s prior convictions further supported the conclusion that she had the specific intent to leave the store without paying. The evidence supported the verdict even though Park confronted defendant before she exited the store with the merchandise in her purse.

B. Defendant Shows No Abuse of Discretion In Admitting Evidence of Her Prior Offenses

As summarized above, the trial court permitted evidence of two prior offenses under Evidence Code section 1101, subdivision (b), and it is undisputed that the evidence was admissible under that statute.⁴

⁴ Evidence Code section 1101, subdivision (b) provides: “Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent,

The trial court concluded the evidence was relevant to show motive, opportunity, intent, preparation and plan and knowledge, absence of mistake. The issue on appeal is whether the trial court abused its discretion in overruling defendant's motion to exclude the evidence pursuant to Evidence Code section 352. The trial court overruled defendant's objection pursuant to section 352, explaining: "Everything that the prosecution wishes to use against the defendant is prejudicial. The question is whether the probative value substantially outweighs [the] prejudicial effect. I think in this case it does."

Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) " "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " " (People v. Williams (2013) 58 Cal.4th 197, 270.) We review the trial court's ruling for abuse of discretion. (Id. at pp. 270-271.)

On appeal, defendant argues that the prior incidents should have been excluded because they were "not very probative" and were "very prejudicial" because they portrayed

preparation, plan, knowledge, identity, absence of mistake or accident, . . . other than his or her disposition to commit such an act."

defendant as “a violent person.” According to defendant, jurors may have convicted her to punish her for the uncharged offenses.

Defendant fails to apply the appropriate standard of review. Her argument, which highlights only the evidence most favorable to her, does not demonstrate that the trial court acted in an arbitrary manner. Although the trial court recognized that the evidence was prejudicial, its conclusion that the evidence’s probative value outweighed any prejudicial effect was supported by the record. The evidence was probative of defendant’s intent, a disputed issue at trial (and on appeal). The evidence supported the prosecutor’s contention that defendant intended to steal, not merely to retain custody of her purse.

Defendant’s argument that the jury could have convicted her of the current offense based on her prior offenses ignores the jury instructions. The court expressly instructed the jury that the evidence of the uncharged conduct could be considered only for the “limited purpose” of deciding whether “[t]he defendant acted with the intent to deprive the owner of the items taken permanently; [¶] (2) The defendant’s alleged actions were the result of mistake or accident; [and] [¶] (3) The defendant had a plan or scheme to commit the offense alleged in this case.” Jurors were further instructed: “Do not consider this evidence for any other purpose.” The court also instructed jurors: “Do not conclude from this evidence that the defendant has a bad character or is disposed to commit [a] crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Robbery. The People must still prove that charge beyond a reasonable doubt.” On appeal, we presume the jury

followed the trial court's instructions. (*People v. Mills* (2010) 48 Cal.4th 158, 200-201.) The trial court's instructions were correct, and defendant does not contend otherwise. Accordingly, defendant has failed to demonstrate any reasonable probability that the jury convicted her of the current robbery based on the uncharged offenses.

**C. Defendant Demonstrates No Abuse of
Discretion in the Denial of Her *Romero* Motion**

Relying on statements in the motion to dismiss the prior strike offense concerning defendant's background, defendant argues that the court abused its discretion in denying her *Romero* motion. According to her, the sentence the trial court imposed was "so irrational or arbitrary that no reasonable person could agree with it" Defendant's argument ignores the violence she used during the current offense and her long history of criminal offenses.

In *Romero*, our high court held that the Three Strikes law did not remove a sentencing court's discretion to dismiss a defendant's prior strike or strikes to achieve a punishment in the furtherance of justice. (*Romero, supra*, 13 Cal.4th at p. 504.) In *People v. Williams* (1998) 17 Cal.4th 148, the Supreme Court explained that a sentencing court should apply the following standard: "[W]hether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.) We review the trial

court's refusal to dismiss a prior strike conviction for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374-375.)

The trial court acted well within its discretion in denying defendant's motion to strike her prior conviction. Although the victim, Park, escaped with only bruising and scratching, defendant repeatedly punched his face, conduct with the potential for serious injury. The 911 call in this case revealed that another employee observed defendant to be very violent. Defendant's prior convictions also involved violence as reflected in the evidence of the uncharged offenses. Defendant was on supervised release at the time she committed this offense and failed to comply with the conditions of her release. Not only did she commit another criminal offense, but she also failed multiple tests for controlled substances. When all of these circumstances are considered, the trial court's conclusion cannot be described as an abuse of discretion.

D. The Case Must Be Remanded for the Trial Court to Exercise Its Discretion to Strike or Dismiss a Prior Serious Felony Conviction

Effective January 1, 2019, the trial court has discretion under sections 667, subdivision (a) and 1385, subdivision (b) to strike or dismiss a serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The new statutes apply retroactively to defendant as her conviction is not yet final. (*Id.* at pp. 972-973.) The parties agree that this case should be remanded to the trial court for the court to exercise its newly-obtained discretion.

DISPOSITION

The judgment is affirmed. Upon remand, the trial court shall determine whether to strike the section 667, subdivision (a)(1) enhancement. If the court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, J. *

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.